APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-2057

RICHARD BREEDLOVE, individually, and on behalf of all others similarly situated; NADINE TANNER, individually, and on behalf of all others similarly situated,

Plaintiffs/Appellants,

v.

EARTHGRAINS BAKING COMPANIES, INC., doing business as CAMPBELL TAGGART BAKING COMPANY, INC.,

Defendant/Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas

---

Submitted: November 19, 1997
Filed: April 9, 1998

Before McMILLIAN and WOLLMAN, Circuit Judges and STEVENS, District Judge.[1]

---

[1] The Honorable Joseph E. Stevens, Jr., United States District Judge for the Western District of Missouri, sitting by designation.

STEVENS, District Judge.

Plaintiffs/appellants are former employees of appellee/defendant Earthgrains Baking Companies, Inc. ("Earthgrains"). Plaintiffs brought this suit against Earthgrains pursuant to the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101 et seq. The district court [2] granted Earthgrains' motion to dismiss on the ground that plaintiffs had been compensated fully under the WARN Act. *See Breedlove v. Earthgrains Baking Companies, Inc.*, 936 F. Supp. 802 (E.D. Ark. 1997). We affirm.

I.

Plaintiffs worked at Earthgrains' baking plant in Little Rock, Arkansas. In December of 1995, Earthgrains notified its employees, including plaintiffs, that it would close the Little Rock plant. Plaintiffs then brought suit alleging that Earthgrains had violated the WARN Act's notice provision, 29 U.S.C. § 2102, which requires certain employers "to provide written notice to each affected employee sixty (60) days in advance" of the closing of a covered facility.[3] In their complaint, the plaintiffs sought recovery of wages that they claim should have been paid during the notice period. They admitted that Earthgrains had "paid [them] for working days within the required 60 day notification period." App. 95, Compl. ¶ 14. However, the employees alleged that they were entitled to wages for each calendar day within the violation period.

Earthgrains then moved to dismiss the action. Earthgrains claimed, on the basis of plaintiffs' admission that Earthgrains had paid wages for working days within the notification period, plaintiffs had not stated a claim for

---

[2] The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas.

[3] On this appeal, there is no dispute that Earthgrains was an "employer" subject to the WARN Act's provisions and that Earthgrains' actions triggered the notice requirement.

relief. Earthgrains contended that these wages constituted the entire amount they were obligated to pay under the WARN Act. Plaintiffs concurrently moved for summary judgment claiming that they were entitled to wages for each calendar day within the violation period as a matter of law. The district court granted Earthgrains' motion to dismiss and denied plaintiffs' motion for summary judgment, holding that the employees were entitled only to wages for each working day within the notification period. The district court found that the damages provision of the WARN Act was capable of more than one reasonable interpretation and, therefore, examined the legislative history to discern Congressional intent. Finally, the district court found that the legislative history demonstrated that Congress "unequivocally" intended that damages be measured by working days rather than calendar days. *See* 963 F. Supp. at 805.

II.

The standard for a district court to employ in ruling a motion to dismiss is clear. A district court must accept the allegations contained in the complaint as true, *see Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), and all reasonable inferences from the complaint must be drawn in favor of the nonmoving party. *See Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996). "[D]ismissal is inappropriate 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *McCormack v. Citibank, N.A.*, 979 F.2d 643, 646 (8th Cir. 1992) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Our standard of review of a district court's grant of a motion to dismiss is similarly clear. We review de novo. *See Hafley*, 90 F.3d at 266; *First Commercial Trust Co., N.A. v. Colt's Mfg. Co., Inc.*, 77 F.3d 1081, 1083 (8th Cir. 1996); *Weaver v. Clarke*, 45 F.3d 1253, 1255 (8th Cir. 1995).

III.

The issue of whether an employer's liability to affected employees due to a violation of the WARN Act's notice requirement should be calculated based on working days or calendar days has been addressed by several courts. The majority of Circuit Courts have held working days to be the proper basis for the calculation. *See Carpenters District Council v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275, 1282-86 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Saxion v. Titan-C Manufacturing, Inc.*, 86 F.3d 553, 558-61 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757, 771-72 (10th Cir. 1995), *cert. dismissed*, 116 S. Ct. 1588 (1996). Only one Circuit Court has held that compensation to employees for a violation of the WARN Act's notice provisions is based on calendar days rather than working days. *See United Steel Workers of America v. North Star Steel Co., Inc.*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994). As noted above, the district court in this case found working days to be the proper basis, *see* 963 F. Supp. at 805, while another judge of the same district previously held that liability was based on calendar days. *See Joshlin v. Gannett River States Publ'g Corp.*, 840 F. Supp. 660 (E.D. Ark. 1993). The issue, however, is one of first impression for this Court.

A.

An employee's compensation when an employer violates the WARN Act's notice requirement is governed by 29 U.S.C. § 2104(a)(1). The statute provides that any employer who violates the notice provision "shall be liable to each aggrieved employee who suffers an employment loss for "back pay for each day of violation." *Id.* Our analysis, of course, begins by examining the language of the statute. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citing

Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)); *United States v. Bishop*, 894 F.2d 981, 985 (8th Cir.), *cert. denied*, 498 U.S. 836 (1990). If the statute is clear and unambiguous because it is not possible to construe it in more than one reasonable manner, we need go no further. *See In re Erickson Partnership*, 856 F.2d 1068, 1070 (8th Cir. 1988); *Beef Nebraska, Inc. v. United States*, 807 F.2d 712, 717-18 (8th Cir. 1986) (citing *Maine v. Thiboutot*, 448 U.S. 1, 6 n.4 (1980)).

The statute defining compensation to be paid for a notice violation reads as follows:

> (1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—
>
> > (A) back pay for each day of violation at a rate of compensation not less than the higher of—
> >
> > > (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
> >
> > > (ii) the final regular rate received by such employee; and
> >
> > (B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.
>
> Such liability shall be calculated for the period of violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

29 U.S.C. § 2104(a)(1).

Of course, the relevant language in this case is the phrase "back pay for each day of violation." *Id.* § 2104 (a)(1)(A). On one hand, the term "back pay" seems to imply wages that the employee would have received absent a violation. The Supreme Court construed the term "back pay" as used in the National Labor Relations Act as "payment of a sum equal to what [an employee] normally would have earned absent a violation of the statute." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). Using working days to calculate an employer's liability could be a reasonable interpretation of this language. On the other hand, the phrase "for each day of violation" seems to imply that an employee would receive daily wages for each day of the violation period. Using calendar days to calculate an employer's liability could be a reasonable interpretation of this language.

Thus, in our view, the statute is susceptible to more than one reasonable interpretation. If "for each day of violation" mandated the use of calendar days, employees would be paid for days on which they do not work. Such an interpretation would fly in the face of what is commonly thought of as "back pay." To interpret the phrase "back pay for each day of violation" to mean that employees should receive wages on days they otherwise would not have been paid would be to write the "back pay" out of the statute. But to interpret the statute, on its face, as requiring the use of working days alone to arrive at a figure for "back pay," would not fully account for the phrase "for each day of violation."

The Third Circuit in *North Star Steel* came to the opposite conclusion, finding that the statute could not be reasonably construed in more than one way. The *North Star Steel* Court held that the term "back pay" is "simply a label used to describe the amount of damages for which an employer is liable for each day of the violation." *North Star Steel*, 5 F.3d at 42. It reached this conclusion using three common rules of statutory construction. *See id.* at

42-43. We, however, agree with the conclusions of the Fifth and Sixth Circuits that none of the rules of statutory construction used by the Third Circuit compelled the result that the Third Circuit reached. *See Dillard*, 15 F.3d at 1283 n.14; *Saxion*, 86 F.3d at 559-60. As demonstrated by their analyses, we believe that interpreting this provision on its face using rules of statutory construction creates even more ambiguity as to its proper meaning.

A statute can also be considered ambiguous when a particular interpretation from the face of a statute could lead to an anomalous, unusual or absurd result. A hypothetical situation, as set forth in *Dillard* is illustrative.

> [T]he violation period contains sixty days. Employee "A" is a full-time employee who works a regular eight-hour shift each weekday. However, employee "B" is a part-time employee who works just one ten-hour shift each Saturday. Under the . . . calendar-day approach, employee "A" would receive 480 hours pay in lieu of notice (eight hours per day times sixty days), while part-time employee "B" would receive 600 hours pay (ten hours per day times sixty days).

Dillard, 15 F.3d at 1285. Although Congress could possibly have intended this result, we believe that this hypothetical outcome is so unusual that we cannot ignore the likelihood that the legislative history would clarify Congress' intent.

B.

Having determined that there is ambiguity in the statute because it is subject to more than one reasonable interpretation, we next turn to the legislative history. As the Fifth and Sixth Circuits noted, a Senate Report regarding this legislation provides the answer. *See Dillard*, 15 F.3d at 1284-85; *Saxion*, 86 F.3d at 560.

> For violations of the notice provisions, damages are to be measured by the wages the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the

> notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S. Rep. No. 62, 100th Cong. 1st Sess. 24 (1987). Since "damages are to be measured by the wages the employee would have received," *id.*, the number of working days within the violation period must be used to calculate the amount owed by the employer. *See Dillard*, 15 F.3d at 1284. Also, the Senate Report language "mirrors" the interpretation of "back pay" in *Phelps Dodge Corp. v. NLRB*. Jeffrey Turner, Comment, *Damages Under the Workers Adjustment and Retraining Act (WARN): Why Damages Cannot Be Based on Calendar Days*, 12 T.M. Cooley L. Rev. 197,213 (1995). Therefore, we believe that the Senate Report's statement decides the issue.[4]

Plaintiffs argue that there is an inconsistency between the first sentence and the second sentence of the Senate Report statement quoted above. Plaintiffs reason that the first sentence indicates a "make-whole" calculation of damages while the second sentence mandates a remedy which is punitive in nature. We are unpersuaded that there is an inconsistency. Employers are, in a sense, penalized by not using the notice provisions because they must pay affected workers wages although no work was done. The WARN Act's provisions can still be viewed as punitive or deterrent even though the employees do not receive an undue windfall. Ultimately, however, we find the clear statement of the Senate Report controlling.

Plaintiffs also argue that the purpose of the WARN Act is to provide workers who are laid off notice so that they

---

[4] We also note that the Senate appears to have reached a consensus that the WARN Act is not a way "to place an additional financial burden on the employers of this country." 134 Cong. Rec. 15,928 (1988) (statement of Sen. Metzenbaum).

may adjust to changed circumstances, describing the WARN Act as requiring notice so that employees may continue to be at the plant or factory location and gather to receive counseling and training. Plaintiffs refer to legislative debate which rejected an amendment to the WARN Act to allow "severance pay in lieu of notice." 134 Cong. Rec. 15,926 (1988) (statement of Sen. Quayle). *See also id.* at 15,928 (statement of Sen. Metzenbaum) ("[T]he bill is about giving notice. It is not a mandatory severance bill . . . ."). Although the debate evinces a purpose to require employers to give notice rather than allowing them to thwart the purposes of the statute by giving affected workers "severance pay," we believe it does not overcome the clear intention manifested in the Senate Report.

Moreover, this Court has characterized the WARN Act as "most closely analogous to an action to recover damages for a breach of an implied contract (or breach of an obligation) to notify employees for terminating them." *Aaron v. Brown Group, Inc.*, 80 F.3d 1220, 1225 (8th Cir. 1996). This bolsters our conclusion that Congress did not intend to provide employees who did not receive notice more compensation than they would have received had notice been given.

IV.

We hold that an employer's liability under the WARN Act's compensation provision, 29 U.S.C. § 2104(a)(1), is calculated based on working days. Because the employees admitted in their complaint that they were paid all wages for working days within the violation period, we affirm the decision of the district court to dismiss the complaint for failure to state a claim upon which relief could be granted.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

[Filed Feb. 10, 1997]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-96-549

RICHARD BREEDLOVE, *et al.*,
Plaintiffs

vs.

EARTHGRAINS BAKING COMPANIES, INC.
d/b/a CAMPBELL TAGGART BAKING COMPANY, INC.
Defendant

ORDER

Pending before the Court are defendant's motion to dismiss (#8) and plaintiffs' motion for partial summary judgment (#14). For the reasons stated below, the motion to dismiss is granted (#8).

Plaintiffs filed their complaint alleging the defendant had violated the Worker Adjustment and Retraining Act ("WARN Act"), 29 U.S.C. §§ 2101-2109 by failing to provide written notice to each affected employee sixty (60) days in advance" of the closing of defendant's Little Rock facility. 29 U.S.C. § 2102. As damages, plaintiffs sought lost salaries, wages and benefits for each calendar day in which defendants were in violation of the notice period, prejudgment interest, costs, attorney's fees and a civil penalty of $500.00 per day for each day of the alleged violation. Defendant filed a motion to dismiss plaintiffs' complaint on the grounds that the plaintiffs were

not entitled to back pay for each calendar day in which defendants were in violation of the notice period and were not entitled to a civil penalty. Plaintiffs moved for partial summary judgment on the method of calculation regarding back pay and benefits.

The issue before the Court is whether employees are entitled to back pay for violation of the notice provision of the WARN Act for each calendar day up to sixty (60) days as claimed by the plaintiffs or for only the actual working days within the sixty (60) days as claimed by the defendant.

The WARN Act provides the following:

(a) Civil Action against employers

(1) Any employer who orders a plant closing or mass lay-off in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or lay-off for—

(A) *Back pay for each day of violation* at a rate of compensation not less than the higher of—

(i) The average regular rate received by such employee during the last three years of the employees employment; or

(ii) The final regular rate received by such employee; and

(B) Benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

> *Such liability shall be calculated for the period of violation, up to a maximum of sixty days,* but in no event for more than one half the number of days the employee was employed by the employer.
>
> . . . (3) Any employer who violates the provisions of section 2102 of this title with the respect to a unit of local government shall be subject to a civil penalty of not more than $500.00 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within three weeks from the date the employer orders the shut down or lay-off.

28 U.S.C. § 2104(a) (emphasis added).

The starting point in statutory construction is the language of the statute itself. *U.S. v. Bishop,* 894 F.2d 981, 985 (8th Cir., *cert. denied,* 498 U.S. 836 (1990). If the language is clear and unambiguous, the inquiry is over. If, however, a statute is susceptible of more than one reasonable interpretation, then the reviewing court must look beyond the language of the statute to ascertain the intent of the legislative body. *In re Hammers,* 988 F.2d 32, 34 (5th Cir. 1993).

Section 2104 of the Act addresses the damages an employer must pay if it does not give adequate notice of a plant closing. If an employer violates the notice provision, the employer must pay the employee "back pay for each day of the violation." 29 U.S.C. § 2104(a)(1)(A). What is ambiguous and subject to differing interpretations are the terms "back pay" and "for each day of the violation."

The term "back pay" suggests a lost earnings concept requiring payment of a sum that restores the employee to the position he would be in if the layoff had never occurred. The term "each day of the violation" seems to require payment for each calendar day within the violation period which would more than restore the employee to his position as if the layoff had not occurred. *See Carpenter's Dist. Council v. Dillard Dep't. Stores*, 15 F.3d 1275, 1286 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 933 (1995).

Circuit courts have reached differing conclusions as to the proper calculation of damages pursuant to 29 U.S.C. § 2104(a)(1)(A). The Third Circuit holds that the statute requires payment of damages based upon the number of calendar days within the violation period. *See United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994). The Fifth and Sixth Circuits reason that the use of the term "back pay" immediately followed by the phrase "for each day of the violation" makes the damage provision of the statute ambiguous requiring a reference to the intent of the legislature. *See Saxion v. Titan-C Manufacturing, Inc.*, 86 F.3d 553, 561 (6th Cir. 1996); *Carpenter's Dist. Council v. Dillard Dep't. Stores*, 15 F.3d at 1286. The Eighth Circuit has not ruled on this precise issue.

Plaintiff urges that this Court adopt Senior District Judge Eisele's ruling that the statute is absolutely unambiguous on its face that back pay is required for "each day of violation." *See Joshlin v. Gannett River States Pub. Corp.*, 840 F.Supp. 660 (E.D. Ark. 1993). Although this Court has the utmost respect for the opinions of Judge Eisele, it must disagree with the ruling in *Joshlin* and find that the statute at issue is capable of more than one reasonable interpretation for the following reasons.

At the time of Judge Eisele's opinion, all of the existing case authority supported his ruling. Since that time, two circuits have issued contrary opinions. *See Saxion*, 86

F.3d at 561; *Carpenter's*, 15 at 1286. Moreover, one of the district court opinions upon which Judge Eisele relied was subsequently overruled. *See Carpenter's Dist. Council v. Dillard Dep't. Stores*, 778 F.Supp. 297 (E.D. La. 1991) *rev'd in part*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 993 (1995).

Finally, Judge Eisele based his ruling in part on his characterization of the WARN Act as a "punitive statute not a 'make-whole statute'." *Joshlin* at 663. Since Judge Eisele so reasoned, the Eighth Circuit has ruled in *Aaron v. Brown Group, Inc.*, 80 F.3d 1220 (8th Cir.), *cert. denied*, 117 S.Ct. 361 (1996) that a state statute of limitations for penal actions was inapplicable to the WARN Act. The Eighth Circuit affirmed the lower court in *Aaron* which specifically rejected the application to the WARN Act of a statute of limitations for penal actions because, it concluded, the WARN Act did not operate as a penalty to employers and instead was remedial in nature. *Id.* Other district courts have reached a similar conclusion. *Wholesale and Retail Food Distribution Local 63 v. Santa Fe Terminal Serv.*, 826 F.Supp. 326, 330 (C.D. Cal. 1993); *Solberg v. Inline Corp.*, 740 F.Supp. 680, 685 (D. Minn. 1990).

Because this Court finds the statute capable of more than one reasonable interpretation, the Court must look to the legislative intent to determine its meaning.

The clearest statement made with respect to the damage portion of the WARN Act is contained in the Senate Report:

> [f]or violations of the notice provision, *damages are to be measured by the wages . . . the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period*, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions

> [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S.Rep. No. 62, 100th Cong., 1st Sess. 24 (1987) (emphasis added).

This Court agrees with other courts who have considered this legislative history and found that this language states unequivocally that congressional intent is that damages should be calculated by working days within the notice period and not by calendar days.

Plaintiffs have now conceded that defendant notified the state dislocated worker unit and the chief elected official of the unit of local government as required by the WARN Act. Plaintiffs learned of this notification through discovery and are no longer claiming a civil penalty.

Defendant contends the making of a claim for civil penalties violates Rule 11 of Federal Rules of Civil Procedure and entitles it to an award of attorney's fees. This Court disagrees and declines to award any fees to defendant. Plaintiffs complied with Rule 8 of Federal Rules of Civil Procedure in notifying defendant of all claims which they intended to assert. Upon discovering the true facts, they abandoned this claim. There is no indication of bad faith on the part of plaintiffs or their attorneys which would justify the imposition of fees or costs.

Defendant's motion to dismiss is granted (#8). Plaintiffs' motion for partial summary judgment is denied (#14). Plaintiffs' motion to certify class action (#2) and defendant's motion to stay certification of class action (#10) are rendered moot.

IT IS SO ORDERED this 10th day of Feb., 1997.

/s/ James M. Moody
JAMES M. MOODY
United States District Judge

[Filed Feb. 10, 1997]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Case No. LR-C-96-549

RICHARD BREEDLOVE, *et al.*,
Plaintiffs

EARTHGRAINS BAKING COMPANIES, INC.
d/b/a CAMPBELL TAGGART BAKING COMPANY, INC.
Defendant

JUDGMENT

Pursuant to the Order entered in this matter on this date, it is Considered, Ordered and Adjudged that the complaint in this case be, and it is hereby, dismissed.

IT IS SO ORDERED this 10th day of February, 1997.

/s/ James M. Moody
JAMES M. MOODY
United States District Judge

APPENDIX C

[Filed Jul. 17, 1996]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil Action No. LR-C-96-549

RICHARD BREEDLOVE and NADINE TANNER,
Individually, and on behalf of all others similarly situated,
Plaintiffs

v.

EARTHGRAINS BAKING COMPANIES, INC.
d/b/a CAMPBELL TAGGART BAKING COMPANY, INC.,
Defendants

PLAINTIFFS DEMAND A JURY TRIAL

COMPLAINT—CLASS ACTION

COME NOW the plaintiffs, by and through their undersigned attorneys, Martin, Trumbo & Sterling, Fayetteville, Arkansas, and for their Complaint against the defendant, state and allege as follows:

JURISDICTION

(1) This Court has jurisdiction over this class action pursuant to 28 U.S.C. § 1331 and § 1337 as well as 29 U.S.C. § 2104(a)(5), because of claims brought under 29 U.S.C. § 2101 *et. seq.*, the Worker Adjustment and Retraining Notification Act ("WARN").

VENUE

(2) Venue is proper herein pursuant to 28 U.S.C. § 1391(b) and (c) because the defendant was, for the period relevant herein, doing business in the Eastern District of Arkansas, Western Division, and the claims alleged herein arose in Little Rock, Arkansas within the Eastern District of Arkansas, Western Division.

PARTIES

(3) The named plaintiffs herein at all times relevant to this complaint were past employees at the Earthgrains Baking Companies, Inc. d/b/a Campbell Taggart Baking Company, Inc., located in Little Rock, Arkansas, whose positions were terminated beginning in or about December, 1995, or shortly thereafter.

(4) The defendant, Earthgrains Baking Companies, Inc. d/b/a Campbell Taggart Baking Company, Inc. (hereinafter "Earthgrains"), was at all times relevant herein, a Delaware corporation. At all times relevant herein, Earthgrains was an "employer" as that term is defined within the meaning of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 (a)(1) (hereinafter "WARN Act").

CLASS ACTION ALLEGATIONS

(5) The named plaintiffs herein bring this action on behalf of themselves and, pursuant to Rules 23 (a)(b)(1) and (b)(3) of the Federal Rules of Civil Procedure and 29 U.S.C. 29 U.S.C. [sic] § 2104 (a)(5)(A), on behalf of a class consisting of themselves and of all other persons similarly situated for the following reasons:

> (a) That the class of "aggrieved employees" of the defendants under WARN is so numerous (approx. 100) that joinder of all members is impracticable;

(b) That there are questions of law and fact common to the class, including but not limited to:

(i) Whether the defendants ordered a "mass layoff" as that term is defined within the WARN Act which resulted in a "plant closing" as that term is defined within the WARN Act;

(ii) Whether 50 or more full-time employees sustained an "employment loss" as that term is defined within the WARN Act;

(iii) Whether the defendant violated the WARN Act 29 U.S.C. § 2101 *et. seq.* by failing to pay each plaintiff back-pay for sixty (60) days as required by the WARN Act.

(c) That the claims of the plaintiffs are typical of the claims of the class;

(d) That the class which plaintiffs seek to represent are all former employees of Earthgrains, Little Rock, Arkansas plant, who suffered a loss of wages and benefits as a result of the defendant's failure to pay back-pay for sixty (60) days;

(e) That the plaintiffs would be adequate representatives of the class, because;

(i) The plaintiffs are represented by competent, experienced, and vigorous counsel and are able to adequately finance the litigation;

(ii) The interests of the plaintiffs are coextensive with the other members of the class;

(iii) The plaintiffs' interests are not antagonistic in any way to the interests of those they represent;

(iv) There would be adequate numerical representation in this suit.

(f) That the common questions of law and fact to the members of the class predominate over any questions affecting only individual members and that a class action will more efficiently and fairly adjudicate this cause of action.

FACTUAL ALLEGATIONS AND CAUSE OF ACTION—WORKER ADJUSTMENT RETRAINING AND NOTIFICATION ACT 29 U.S.C. § 2101—ET. SEQ. (WARN ACT)

(6) That on December 6, 1995, the defendant notified the bargaining unit representative for its Little Rock, Arkansas employees that it would permanently close its Little Rock, Arkansas facility on Februray 4, 1996.

(7) That by December 31, 1995, the defendant had laid off approximately 100 full-time employees including the named plaintiffs herein.

(8) That the defendant, Earthgrains located in Little Rock, Arkansas, constitutes a single site of employment as that term is defined within the WARN Act.

(9) That the "mass lay off" described resulted in an "employment loss" for more than 50 full-time employees of the defendant, Earthgrains, 29 U.S.C. § 2101 (a)(3) & (6).

(10) That the "mass lay off" described resulted in a "plant closing" of the Little Rock, Arkansas facility as that term is defined within the WARN Act, 29 U.S.C. § 2101 (a)(2).

(11) That the plaintiffs and each and every member of the plaintiff class are "affected employees" within the meaning of the WARN Act, 29 U.S.C. § 2101(a)(5).

(12) That the defendant failed to provide written notice to each affected employee 60 days in advance of the plant closing of the Earthgrains facility located in Little Rock,

Arkansas. Without such notice the defendant violated the provisions of the WARN Act, 29 U.S.C. § 2101 *et. seq.*

(13) That the WARN Act, U.S.C. § 2102 (a) requires that an employer provide each affected employee 60 days advance written notice of any plant closing, as well as requiring notification to the State Dislocated Worker Unit of the plant closing and the chief elected official of the unit of local government where the closing will occur.

(14) That in lieu of a 60 day notification period required by WARN, the defendant paid its affected employees for working days within the required 60 day notification period.

(15) That the WARN Act requires that an employer who fails to provide each aggrieved employee 60 days advance written notice of a plant closing is required to pay each aggrieved employee back pay for each calendar day of the violation at a rate of compensation not less than the higher of the average regular rate received by each affected employee during the last three years of the employees employment or the final regular rate received by each affected employee, 29 U.S.C. § 2104 (a)(4)(A).

(16) That the defendant has failed to pay each named plaintiff and members of the proposed plaintiffs class in accordance with the provisions of WARN, 29 U.S.C. § 2104 (a)(1)(A), by failing to pay each aggrieved employee back pay for each calendar day of the violation, such days totalling 60 in number.

(17) That the defendant, Earthgrains, is directly liable for making the decision which resulted in the permanent closing of the plant in Little Rock, Arkansas.

(18) That pursuant to the WARN Act, 29 U.S.C. § 2104 (a)(3), any employer who violates the provisions of § 2102 of the WARN Act for failure to notify the proper local government official and the State Dislocated

Worker Unit shall be subject to a civil penalty of up to $500 per day for violation up to a maximum of 60 days.

(19) That as a result of the defendant's violation of the WARN Act, the plaintiffs have been injured in amounts equal to their respective lost salaries, wages and benefits that they would have continued to receive for a period of 60 calendar days after the dates of their respective discharges, less any payments made by the defendant. Such lost pay is to be calculated in accordance with 29 U.S.C. § 2104 (a)(1)(A), and is to include all lost benefits.

(20) That as a result of the defendant's violation of the WARN Act, a civil penalty for each day of violation at the rate of $500 per day should be assessed against the defendant.

(21) That plaintiffs, and all others similarly situated, seek from the defendant pre-judgment interest, attorney's fees and all other costs incurred in this cause pursuant to 29 U.S.C. § 2104 (a)(6).

WHEREFORE, plaintiffs, on behalf of themselves and all others similarly situated, demand as follows:

(a) That this action be certified as a class action for the benefit of all former employees of Earthgrains, who suffered an employment loss on or about December 31, 1995, and subsequent dates thereafter;

(b) That each named plaintiff, as well as other members of the class similarly situated, be awarded judgment against the defendant, Earthgrains, for back-pay and benefits as provided in the WARN Act, as well as prejudgment interest on the amounts owed;

(c) That a civil penalty be assessed against the defendant at the rate of $500 per day of violation;

(d) That the plaintiffs and members of the class be awarded costs of this cause of action, including attorney's fees against the defendant;

(e) That the plaintiffs and class members receive any and all other relief to which they may be deemed entitled; and,

(f) That, in the alternative, if this action is not certified as a class action that the plaintiffs listed be entitled to proceed on their claims individually and that each be awarded judgment for back-pay, benefits and costs as provided in the WARN Act.

PLAINTIFFS DEMAND A TRIAL BY JURY.

RICHARD BREEDLOVE and NADINE TANNER, Individually, and on behalf of all others similarly situated, *Plaintiffs,*

By /s/ David Fausett
DAVID FAUSETT
Attorney
Arkansas Supreme Court
No: 95263

By /s/ Brent Sterling
BRENT STERLING
Attorney
Arkansas Supreme Court
No: 88166

MARTIN, TRUMBO & STERLING
P.O. Drawer 3597
Fayetteville, AR 72702
(501) 442-2244

Attorneys for the Plaintiffs